IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Jackson June 3, 2008

STATE OF TENNESSEE v. ERIC LORNAIL ABELL

Appeal from the Circuit Court for Rutherford County
No. M-59317 Donald P. Harris, Senior Judge

No. M2007-01565-CCA-R3-CD - Filed October 1, 20008

The defendant, Eric Lornail Abell, appeals from his conviction by a jury in the Rutherford County Circuit Court for driving on a revoked license, a Class B misdemeanor, for which he was sentenced to six months to be served at fifty percent and consecutively to previous sentences. He contends that the evidence is insufficient to support his conviction and that he is entitled to "probation, concurrent sentencing, or other alternative sentencing." We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Gerald L. Melton, District Public Defender, and Jeffrey S. Burton, Assistant Public Defender, for the appellant, Eric Lornail Abell.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Trooper Anthony Griffin testified that on April 6, 2006, he responded to a motorist assist call regarding a car in Rutherford County on Interstate 24 at milemarker 72. When he arrived at this milemarker, he saw the defendant pouring gasoline from a gasoline can into a car. Trooper Griffin stated he turned on his blue lights and video recorder. Trooper Griffin said that he checked the license plate and that it belonged to another car. He said that he called the defendant to his car and that he asked the defendant for his license and to explain the license plate. He stated the defendant said his license had been suspended. Trooper Griffin said that the defendant did not provide proof of automobile insurance, although he did produce a document, the content of which the trooper could not remember. Trooper Griffin stated the defendant told him that he had driven the car to this point.

Trooper Griffin said the defendant told him that he had been on his way to work and that the car had run out of gas.

Trooper Griffin testified that he issued a citation to the defendant. Trooper Griffin stated he obtained from the Department of Safety the defendant's official driver record, which revealed that the defendant's driving status was "revoked" due to the defendant's failure to file security after a car accident and that a notice of the revocation had been sent on August 17, 2005. Trooper Griffin said he had filed a warrant the day of the citation, April 6, 2006. He said that the details in the affidavit of complaint were from his memory of the event occurring earlier that day and that they were not developed or added to on a later date. The affidavit noted that the defendant was the only person in or near the car. Trooper Griffin said the defendant's Certification as to Status of Operator's License reflected that on April 6, 2006, the defendant's driving privileges had been revoked.

The defendant's half-brother, Edrick Smith, testified that on April 6, 2006, at 7 a.m., he was driving his brother's car to a job interview. He said the defendant was in the car with him and was going to his own job when the car ran out of gas. Smith stated that he had been telling his brother they needed to get gas. He said he had not wanted to give the defendant any money for gas. He said that he called his girlfriend, Shelly Hurd, to get him to his job interview and that he gave the defendant gas money. He testified that the defendant left to buy gas, taking with him a red gas can with a yellow top. He stated that his girlfriend came to take him to his interview, but that his interview had to be rescheduled because the interviewer was sick. He said that his girlfriend picked him up from the interview site and that they returned to the abandoned car on Interstate 24, but that his brother was not there.

On cross-examination, Smith admitted that he did not go to the Tennessee Highway Patrol to tell them he had been the driver after he learned of his brother's arrest for driving on a revoked license. He admitted that he did not go to any of his brother's court dates to tell the court that he, not the defendant, had been driving, and that he did not tell his brother's newly-appointed public defender in October 2006 that he had been the driver. He said he had not heard from his brother for six months and that he thought his brother's court dates were for other charges. He said that he did not know the defendant would go to jail for eighteen years because he violated his probation with this conviction. He stated that he did not know he would testify at trial and that the defendant's girlfriend had called him and told him to attend the trial as she could not. He said he did not tell the defendant's attorney until the date of trial that he had been driving on April 6, 2006. He acknowledged having four prior cocaine-related felony convictions.

Initially, the State contends the defendant's appeal should be dismissed, as the notice of appeal was filed outside the thirty-day time limit. See T.R.A.P. 4(a). The defendant filed his notice of appeal on July 6, 2007, and the motion for new trial was denied on May 29, 2007. We note that the defendant omits any discussion of timeliness from his brief and has not filed a reply brief to address the state's argument that this court should dismiss the appeal as untimely. However, the notice of appeal document is not jurisdictional in criminal cases, and in the interest of justice, we elect to waive the requirement for a notice of appeal. Id.

The defendant contends the evidence is insufficient to show he drove a car after his license had been revoked. He argues that the trooper's knowledge of the event comes only from reviewing the warrant and the videotape and that this testimony does not present evidence of the offense beyond a reasonable doubt.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

The defendant was convicted under Tennessee Code Annotated section 55-50-504(a)(1) (2006), which states:

> A person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel . . . or any other premises frequented by the public at large at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor.

Trooper Griffin testified he saw a car on the shoulder of Interstate 24, a public road, in Rutherford County. He said that when he arrived, he saw the defendant putting gas into the car, and his affidavit of complaint states that he saw no one else in or near the car. The officer said the defendant admitted driving the car to this location. He stated the defendant had told him that he was on his way to work and that he had run out of gas. He said the defendant was not able to provide a valid license or registration to him. He stated the defendant had told him his license had been suspended.

The state presented as evidence the defendant's official driver record, which showed the defendant's license had been revoked because he did not provide security after a car wreck. The state also introduced into evidence the certification of the defendant's driving privileges, showing that on April 6, 2006, the day of the event giving rise to the traffic citation, the defendant's driving privileges had been revoked.

"Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). The jury chose to believe the state's documents and

testimony instead of the defense witness's testimony. We conclude the evidence was sufficient to convict the defendant of driving on a revoked license.

The defendant contends that he was entitled to alternative sentencing under Tennessee Code Annotated section 40-35-102(6). He argues that he does not meet the criteria of section 40-35-102(5) and that he must necessarily fall under section 40-35-102(6). He also contends the court erred in imposing the maximum sentence. The state responds that probation is inappropriate for the defendant and that there is no presumption of a minimum sentence for misdemeanants.

Appellate review of misdemeanor sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing that the trial court considered the relevant facts, circumstances, and sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to section 40-35-401(d) note, the burden is now on the appealing party to show that the sentence is improper.

When imposing a misdemeanor sentence, the trial court is not required to conduct a sentencing hearing, but it must afford the parties a reasonable opportunity to address the length and manner of service of the sentence. T.C.A. § 40-35-302(a). The trial court must impose a specific sentence in terms of the months, days, or hours to be served. Id. at § -302(b). Then, the trial court must set the percentage of the sentence that the defendant is to serve in incarceration before being considered for various rehabilitative programs. Id. at § -302(d). We note that the law provides no presumptive minimum for misdemeanor sentencing. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Moreover, in misdemeanor sentencing, the trial court is not required to place specific findings on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). However, the trial court must consider the purposes and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(d); see Troutman, 979 S.W.2d at 274 ("[W]hile the better practice is to make findings on the record when fixing a percentage of a defendant's sentence to be served in incarceration, a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute.").

While a court automatically considers a defendant for probation, the defendant has the burden of establishing that he or she is a suitable candidate for probation. Sentencing Comm'n Cmts. to T.C.A. § 40-35-303(b). "[T]he defendant is not automatically entitled to probation as a matter of law." State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991) (quoting the sentencing commission comments to T.C.A. § 40-35-303(b)). While section 40-35-303(b)(6) is to be read in conjunction with section 40-35-102(6), Sentencing Commission Comments to section 40-35-303(b), the defense is not correct in stating that section 40-35-102(6) applies to the defendant in this particular case. That provision relates to certain felony convictions. Here, the defendant was convicted of a Class B misdemeanor. The defendant also has a sizeable criminal record, including multiple convictions for driving without a license, that does not lend itself to considering the defendant for alternative sentencing. Thus, the defendant has not met his burden of demonstrating

he is a suitable candidate for probation. The trial court did not err in denying probation or other alternative sentencing.

The court also did not err in imposing the maximum sentence. The court heard about the defendant's extensive criminal history. Although the trial court did not mention it in sentencing him, the defendant had several prior convictions for driving without a license. Thus, the defendant has not met his burden of demonstrating that the maximum sentence is improper. The trial court did not err in imposing the six-month sentence.

The defendant contends that the trial court erroneously sentenced him to consecutive sentencing instead of concurrent sentencing. The defendant argues the sentence should either run concurrently with his eighteen-year, one-month effective sentence previously imposed or it should be suspended because the defendant will already be serving the eighteen-year, one-month sentence. The state contends consecutive sentencing is appropriate because the defendant was on probation when he committed the present offense. At the sentencing hearing, the trial court imposed consecutive sentences because the defendant was on probation at the time of the offense. Tennessee Code Annotated section 40-35-115(b)(6) allows a trial court to impose consecutive sentences if the defendant is convicted of more than one offense and the defendant was on probation at the time he committed one of the offenses.

Based upon the foregoing and the record as a whole, we affirm the judgment of the trial court.

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JOSEPH M. TIPTON, PRESIDING JUDGE